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**CHARLES ELMORE 688
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IN THE
Supreme Court of the United States
OCTOBER TERM, A. D. 1946.

No. 133

JOHN H. CHATZ, Trustee in Bankruptcy
of Hoagland & Allum Co., Inc.,
Petitioner,
vs.

MIDCO OIL CORPORATION, a corporation,
Respondent.

PETITION FOR REHEARING.

WILLIAM S. KLEINMAN,
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Counsel for Petitioner.

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MAY IT PLEASE THE COURT:

Since the filing of the petition for certiorari in this cause, the decision of the Supreme Court of Illinois in *Winger v. Chicago City Bank & Trust Co.*, 394 Ill. 94, was officially published in the Advance Reports of September 11, 1946. The instant proceeding embodies a number of established equitable principles as announced by this Court and by a great number of the state supreme courts; however, the language of the Supreme Court of Illinois in the *Winger* case is clearly the strongest, and unequivocally

establishes the justice of petitioner's position as urged throughout this proceeding. The existence of a fiduciary relationship between the respondent corporation and its stockholders, as well as the wilful violation of the respondent's obligations thereunder, were consistently urged and stressed by petitioner in the lower courts.

We have throughout this proceeding insisted that as the result of the fiduciary relationship, which then existed between the corporation and the stockholders whose shares of stock the corporation illegally acquired, the burden was on the corporation to establish this purchase as valid, and that it failed to establish such validity. The Supreme Court of Illinois has held in the *Winger* case that the existence of the fiduciary relationship makes the transaction presumptively fraudulent.

The Supreme Court of Illinois said in that case at page 108:

"They [the directors of the corporation] were the agents for the corporation in the transaction of its business. While not express trustees they were regarded, while dealing with the corporation for their own benefit, as trustees. [Citing cases.] If considered merely as agents, still the relation of principal and agent is a fiduciary one. [Citing cases.] The relation of directors of a corporation to its stockholders, towards the corporation, and in many instances towards its creditors, is a fiduciary relationship. [Citing cases.]"

On page 109 the Court said:

"Therefore, directors of a corporation cannot acquire the property of the corporation without exercising the utmost good faith. [Citing cases.] The sale is presumptively fraudulent."

On page 110 the Court said:

"The question is one when, as between the parties, influence is implied in the very conception of the rela-

tion, in which the position of one is superior to that of the other. It does not involve intentional concealment or misrepresentation, and while equity does not deny the possibility of valid transactions between the two parties, yet, because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity and casts upon that party the burden of proving affirmatively its compliance with equitable requisites to overcome the presumption."

On page 113 the Court said:

"We regard this case as one where the appellants stand in the shoes of fiduciaries who, to their own advantage, have dealt with property of their cestui que trust without disclosure or legal confirmation of their acts. The relationship being shown by strong and unequivocal evidence, the burden of proof to establish rights in the property transferred rests upon appellants."

The record of this case established that the \$65,000.00 with which Mr. Toomey, the president of Midco Oil Corporation, purchased the 2,000 shares of stock in question for the corporation came from the treasury and assets of the corporation; therefore, this money of the corporation was actually the property of the stockholders and was used by the corporation to fraudulently purchase the shares of stock belonging to these stockholders. The situation thus presented is akin to the rule announced by the Supreme Court of Wisconsin in *Huber v. Martin*, 127 Wisc. 412, where on page 433 the court said:

"In a general sense, every member of a mutual corporation is a stockholder and is the equal of any other member similarly situated or any member of any corporation having an equal interest, proportionately as to holding the beneficiary title to the corporate assets. For corporate purposes only the corporate entity owns the property, otherwise it belongs to the members."

Mindful that the funds with which the purchase was made belonged to the stockholders and that these funds were used by Mr. Toomey and the corporation to fraudulently purchase their stock, the rules governing trust relationships as urged by petitioner must of necessity be enforced in this case. The error committed by the District Court and by the Circuit Court of Appeals in failing to determine the existence of the fiduciary relationship and to enforce these important rules is a matter calling for the exercise of this court's supervisory jurisdiction to the end that these errors be reviewed and corrected. When the rules herein cited are viewed in the light of the authorities urged by petitioner in his original brief as well as in petitioner's reply brief filed on August 3, 1946, this Court must inevitably come to the conclusion that the failure of the lower courts to recognize the fiduciary relationship as urged herein by petitioner and to apply the proper rules thereto is fatal to the judgment in this case and that this error justifies a review by this Court and the ultimate reversal of the judgment.

A correct determination of the petition requires the application of sound equitable principles; but basically this record presents a proposition of local law. Having reference to the precepts enunciated by this Court in Rule 38 (5b) as to the circumstances under which certiorari would be considered, we find that this is a case where the Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions" and has "so far departed from the accepted and usual course of judicial proceeding, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision".

Wherefore petitioner respectfully urges this Court to reconsider and to vacate the order entered on October 14,

1946 denying the petition for certiorari; to reconsider and rehear said petition in the light of the authorities cited and to direct the issuance of a writ of certiorari as prayed.

WILLIAM S. KLEINMAN,
Counsel for Petitioner.

State of Illinois, }
County of Cook. }^{ss.}

I, William S. Kleinman, counsel for petitioner, do hereby certify that the foregoing petition for rehearing on behalf of said petitioner is presented in the utmost good faith and is not intended for purposes of delay.

WILLIAM S. KLEINMAN,
Counsel for Petitioner.